IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 260 of 1999

For Approval and Signature:

THE HON'BLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgement ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgement ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 of any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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HERMES TRAVELS &CARGO PVT.LTD - Petitioner(s)
Versus

AYUSH EXPORTS (P) LTD. - Respondent(s)

Appearance :-

MR FB BRAHMBHATT for Petitioner No(s).: 1.

NOTICE SERVED for Respondent No(s).: 1.

MR ASHISH S JOSHI for Respondent No(s).: 1.

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CORAM :THE HON'BLE MR.JUSTICE K.A.PUJ

Date : 15/06/2005

ORAL JUDGMENT

The petitioner has filed this petition under Sections 433, 434 &439 of the Companies Act, 1956 for winding up of the respondent Company on the ground that the respondent company has failed to discharge its liabilities towards the petitioner.

It is the case of the petitioner that the petitioner, as Cargo Agents, booked and air-freighted the Company's consignment from Mumbai to Prague, as specified by the Company, under Air Way Bill No. 020-27429124 dated 07.01.1999. The petitioner raised its bill for Rs. 2,59,496 and submitted it to the Company for payment. The consignment was airlifted by Lufthansa Cargo India as per the instructions of the Company and the Delivery Order was handed over to the consignee – buyer's agent DRUSPED on 15.01.1999. The petitioner has made payment to the Airlines, viz. Lufthanza Cargo India, towards freight charges. The Delivery Order was received by the consignee/buyer's agent on 15.01.1999. As 16/17.01.1999 being non-working days, the consignment in question was received by the Consignee-buyer on 19.01.1999 and the consignment was accepted without raising any complaint or objection. The petitioner was, therefore, entitled to receive its legitimate dues from the Company. It is also the case of the petitioner that despite several letters and reminders sent by the petitioner, the Company has not made payment to the petitioner. In one of the letters, it was informed by the respondent Company to the petitioner that the respondent Company would make the payment to the petitioner if its consignee-buyer in Prague withdrew their claim against the Company for late delivery of the consignment in question. Since the consignee-buyer received the consignment on 19.01.1999 and accepted the same without any complaint or grievance whatsoever, there is no question of raising any claim by the consignee-buyer against the respondent. Since the payment has not been made, the petitioner issued statutory notice on 22.04.1999 which was received by the Company. However, neither any reply was given nor any payment was made by the respondent Company. The petitioner has also issued another notice on 11.06.1999 claiming the outstanding amount of Rs. 2,56,496/- together with interest thereon at 21% p.a. The respondent Company has failed to comply with the said notice and hence, the present petition was filed.

This Court has issued notice on 01.09.1999. Initially, Mr. Ashish S. Joshi, learned advocate has filed his appearance on behalf of the respondent Company. Thereafter, the matter was placed for hearing on 29.03.2000, 03.03.2000, 08.03.2000 and 09.03.2000. However, no reply has been filed by the respondent Company and hence, this Court has issued another notice on 10.05.2000 asking the respondent Company as to why order in terms of 9(B) and 9(C) should not be granted to the petitioner.

An affidavit-in-reply was filed by the respondent Company on 17.07.2000 raising certain disputes against the winding up petition. The affidavit-in-rejoinder was filed by the petitioner on 16.08.2000.

On 30.04.2001, this Court has passed an order recording the statement made by Mr. Ashish Joshi, learned advocate appearing for the respondent Company that the Company is before BIFR. However, no documentary evidence has been produced. On 20.08.2001, another order was passed by this Court recording the statement of Ms. Mini Nair, learned advocate stating that she has to file her appearance on behalf of the respondent Company as Mr. Joshi has to seek discharge as an advocate for the respondent Company. On 05.02.2002, this Court has passed an order directing the office to verify as to whether Ms. Mini Nair or any other advocate has filed appearance for the respondent Company and last opportunity was given to the respondent Company. Thereafter, the matter was not proceeded with for quite some time. On 09.08.2004, this Court has passed an order recording the statement of Mr. F.B. Brahmbhatt, learned advocate for the petitioner that the notice issued by this Court to the respondent could not be served as the respondent Company has shifted its address. He has, therefore, prayed for issuance of fresh notice and direct service was also requested for. New address was thereafter supplied by the petitioner and fresh notice was issued on 17.01.2005 after restoration of the petition by an order dated 24.12.2004 in OJMCA No. 89 of 2004. Despite service of notice, nobody appears on behalf of the respondent Company. The petition was, therefore, admitted on 04.02.2005. However, the order of advertisement was deferred. On 10.03.2005, since nobody has appeared on behalf of the respondent Company, the order of advertisement

was passed and the petition was ordered to be advertised in English daily 'Indian Express' and Gujarati Daily 'Loksatta-Jansatta' – both Ahmedabad editions and the final hearing was fixed on 06.04.2005. Publication of advertisement in the Official Gazette was dispensed with.

Pursuant to the aforesaid order, the petitioner has filed affidavit of advertisement along with which newspaper cuttings were also produced on record. Despite publication of advertisement, no one has appeared on behalf of the respondent Company.

Mr. F.B. Brahmbhatt, learned advocate appearing for the petitioner has submitted that the petitioner has supplied the goods and the same were accepted. Despite supplying goods to the consignee – buyer, the freight charges have not been paid by the respondent Company. The respondent Company has not given any reply to the statutory notice nor choose to appear subsequently before this Court even after admission and advertisement of the petition. The dues are admitted and the respondent Company has failed to discharge its liability. He has, therefore, submitted that the petition be allowed and the respondent Company should be wound up.

In the affidavit-in-reply filed on behalf of the respondent Company, a contention was raised by the Company that there was a clear and explicit verbal understanding between the petitioner and respondent that the aforementioned consignment of garments was to be dispatched to Prague for the purpose of an auction to be held on 14.01.1999. It was also agreed that that the consignment in question had to reach Prague preferably before 13.01.1999 and definitely by 14.01.1999. The goods were delivered by the respondent to the Carrier Lufthansa by 07.01.1999 as the Airway bill was executed by the Carrier on 07.01.1999. The said goods were delivered in Prague only on 19.01.1999, much after the date of the Auction, thereby frustrating the entire purpose for which the goods were to be delivered. It was also stated that the respondent Company has decided to approach the City Civil Court at Ahmedabad to file a Civil suit against the petitioner for recovery of an amount of consignment exported amounting to US $ 62,456.40 plus an amount of US $ 16,651.29 being an amount claimed by the consignee in Prague due to late delivery of the

consignment by the respondent. It was also stated that disputed questions of facts were involved in the petition and it requires leading of evidence in the competent Civil Court. It is, therefore, requested that the winding up petition should summarily be dismissed.

After having heard learned advocate appearing for the petitioner and after having considered the reply filed by the respondent Company, the Court is of the view that though the statement was made before the Court that the respondent Company is before BIFR, no documentary evidence has ever been produced. Even number of opportunities were given by the Court to the respondent Company and statements were made before the Court on different occasions by different persons. No appearance has been filed before the Court nor any latest position in respect of the respondent Company has been made known to the Court. In the affidavit-in-reply, though the statement was made to file Civil Suit against the petitioner, no such suit has been filed. There is nothing on record to show that an agreement was arrived at between the parties that the goods were to be delivered on or before 14.01.1999. The defence, therefore, raised by the respondent Company in the reply does not seem to be genuine and bonafide. The fact remains that the respondent Company has not discharged its liabilities towards the petitioner and freight charges as claimed by the petitioner have not been paid. The Court is, therefore, of the view that the respondent Company has lost its financial substratum and it is not in the public interest to allow such Company to function. The Court, therefore, allows this petition and pass the winding up order against the respondent Company. The Official Liquidator attached to this Court is hereby appointed as the Liquidator of the Company and he is directed to take charge of all the assets of the respondent Company and is further directed to exercise his powers conferred on him under the provisions of the Companies Act, 1956. It is, however, made clear that before taking charge of the assets of the Company, the O.L. Shall intimate to the Directors of the respondent Company and before deploying security agency or taking inventory of the assets of the Company, necessary permission of this Court should be taken.

With this direction and observation, this petition is accordingly allowed with no order as to costs.

[K.A. PUJ, J.]

Savariya